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TITLE OF BAILOR WHEN BAILEE HAS THE RIGHT TO CONSUME AND REPLACE THE BAILED PROPERTY

The case of New Domain Oil & Gas Company v. Hayes (202 Ky. 377, 295 S. W. 715, 38 A. L. R. 172), holds that the gratuitous lending of articles of personal property to be used in connection with the drilling of a well, and consumed and replaced in kind by the bailee, passes title to the bailee, and, therefore, the lender has no title to replacements as against a vendee of the bailee. The court refers to Chapter 4 of Story on Bailments in which the author divides "Gratuitous Loans" into "Commodatum" and "Mutuum," and points out the difference between the two, which is that a commodatum loan is one wherein the borrowed article is to be returned in specie, while one coming within a class of mutuum is a loan or a borrowing for the purpose of consumption by the borrower, or which he may consume in its use, and to be replaced by him in kind at the termination of the bailment. In either case the risk of loss by accident attaches to the depositary or mutuary, since he has the control and dominion over the property. The court declares that, "In the case where a chattel is involved the transaction is a sale with the right of either returning the same property or to replace it, and in which case the mutuary not only obtains the title to the property, but assumes all risk of its loss."

In United States Supply Co. v. Andrews (71 Okla. 293, 176 Pac. 967), it is held that where casing for an oil well was delivered under an agreement that the casing was to be returned unless a paying oil or gas well was produced, or the borrower desired to use the casing in drilling another well, in which event he was to purchase the casing at an agreed price, the agreement was not a sale, but merely an agreement to purchase. The court pointed out that the casing was not to be purchased, unless a paying oil or gas well should be produced and should be used for producing oil or gas by the first party, or in case the first party desired to use such casing in any other well to be drilled for oil or gas. It was declared that under this contract the borrower might have returned the identical casing at any time before he used it in a producing well, or in drilling another well.

In Gilbert Book Co. v. Sheridan (114 Mo. App. 332, 89 S. W. 555), the transaction was held to constitute a bailment, where the contract provided that the bailee was to write a certain text book for the bailor, and the latter was to furnish him with certain law reports, which, if the text book was completed, were to be paid for out of the royalties from the sale thereof. The contract in this case denominated the transaction a loan, and the court pointed out that the evident purport of the whole feature was to the effect that the Gilbert Book Company loaned the books, up to the time of the completion of the editorial work, when they were to become the property of the bailee, and he was to be charged by the book company with the regular price thereof which was to be settled by deductions from the royalties coming to the bailee.

In Federal System of Bakeries v. Miller (92 W. Va. 442, 114 S. E. 749), there was a contract constituting a license to use a certain patented baking system, including ovens and other appliances incorporated in the invention, which contained a provision retaining title in the licensor, not only to the original article, but to any renewals, replacements, replaced or repaired parts. It was held that this constituted a bailment with title to the prop-

erty in the licensor. The court stated that there were no terms or provisions in the contract importing any intent or purpose to vest title, legal or equitable, in the licensee, or any other rights save that of custody and use.

Likewise in the case of Brown v. Cuozzo (89 App. Div. 619, 85 N. Y. Supp. 759), in which it appeared that a sleigh was loaned upon the agreement of the borrower that if he broke it, he would pay for it. This transaction was held not to constitute a sale, the sleigh having been broken by the borrower and he repairing it and offering to return it.

NOTES OF IMPORTANT DECISIONS

RECOVERY OF MONEY PAID ON FORGED CHECK BY DRAWEE BANK TO INNOCENT HOLDER.—In First State Bank & Trust Co. v. First National Bank of Canton (1924), 145 N. E. 382, the Supreme Court of Illinois, although, in general accepting the rule of Price v. Neal, 3 Burr. 1354, endeavors to engraft upon that rule the following corollary: "But where the holder of a forged check has not suffered or may avoid loss, he ought not to be permitted to profit by payment to him by the drawee." In support of this corollary is cited First National Bank of Quincy v. Ricker, 71 Ill. 439, 22 Am. Rep. 104. But it is to be noticed that the latter case stresses the fact that the teller of the bank, having doubts about the signature, told the holder that he would pay it only on condition that the holder would indorse it, and that thereupon the holder did indorse it and receive the money thereon, and the further fact of absence of good faith in the holder. From this it is seen that First National Bank of Quincy v. Ricker, supra, is unsatisfactory precedent for the holding in the principal case, the facts not being similar.

Payment by the drawee is, in effect, an executed acceptance. No such exception as the principal case attempts to engraft upon the rule in Price v. Neal is recognized by the law merchant or by the uniform negotiable instruments law, and no good reason for any such exception seems to exist. See also more extended note on this case, by Professor Louis M. Greeley, in 20 Illinois Law Review, 160.—Ralph S. Bauer, De Paul University Law School.

PRESENCE OF GLASS IN BREAD JUSTIFIES FINDING OF NEGLIGENCE.—The Court of Errors and Appeals of New Jersey, in De Groot v. Ward Baking Co., 130 Atl. 540, holds that the presence of the brass base of an electric light bulb and broken pieces of glass in a baked loaf of bread, so imbedded therein as to lead to the inference that it entered the dough in the mixing or other preparation, justifies a finding of negligence in the baker.

"It is next claimed that there was no proof of negligence. It was shown that the socket portion of a Mazda electric light bulb, similar to those of other bulbs in use in appellant's bakery, together with a number of small pieces of glass, were found upon examination to be imbedded in the bread. The history of the loaf from its delivery to the grocer to the time when it was eaten affords reasonable ground to believe that the bulb and glass did not enter the loaf in that period, and their position in the bread itself afforded full legal justification for the jury's conclusion that they were present as part of the process of mixing and baking, and not through accidental contact from the outside after manufacture. The presence of the foreign substances in the loaf under the circumstances was sufficient to raise an inference that they were there through the negligence of the appellant. Bahr v. Lombard Ayres Co., 53 N. J. Law, 233, 21 A. 190, 23 A. 167."

SKILL REQUIRED OF TREE SURGEONS.—The Georgia Court of Appeals, in Porter v. Davey Tree Expert Co., 129 S. E. 557, in defining the skill necessary to be exercised by tree surgeons, said:

"The obligation which the law imposes upon persons performing medical, other professional and specially skilled services, is that they shall exercise a reasonable degree of care, skill, and ability, which generally is taken and considered to be such a degree of care and skill as, under similar conditions and like surrounding circumstances, is ordinarily employed by their respective professions. On a plea of recoupment, setting up a failure to exercise proper care and skill by such a plaintiff, suing to recover upon contract the value of his services, the burden of sustaining such a plea is on the defendant. Block v. Happ, 144 Ga. 145, 146 (1, a, 2), 86 S. E. 316; Fincher v. Davis, 27 Ga. App. 494 (1, 2, 5), 108 S. E. 905; Chapel v. Clark, 117 Mich. 638, 76 N. W. 62, 72 Am. St. Rep. 587, 42 L. R. A. (N. S.) 125, 126. This rule apparently applies to the implied duties of such a plaintiff, whether the defense is based on a tort for the negligent performance of contractual duties, or on an alleged breach of the contract itself."

CONDITIONAL SALE CONTRACTS IN INDIANA*

However much lawyers may differ as to the expediency of the attempt to secure by codification uniformity in the various states certain of our commercial laws, all will agree that the field of commercial law including sales of personal property, is a proper field for the beginning of the experiment. The vast increase of commerce in every line, the development of transportation by every conceivable means, have tended to obliterate state lines and boundaries. Property sold today in the city of New York can be delivered the same day in the city of Chicago, or a day or so later to a buyer in San Francisco. There has been a constant tendency as a result perhaps of the above conditions to protect the possession of property rather than the title. This it seems is to protect and encourage trade. During the latter half of the last century, the commercial world, probably in an unconscious effort to promote trade and at the same time protect the seller, began to do business under what was called the conditional sale contract. The object to be attained by such transactions was identical with that to be obtained by means of the chattel mortgage but at the same time saving the expense necessary and incidental to having the chattel mortgage recorded. It was stated by the proponents of the conditional sale plan that a buyer will purchase property under such a plan when he would not do so if he had to give a chattel mortgage on the property and thereby cause his name to appear in the records of the county as a mortgagor. Hence the very cause of the growth of this plan in the United States was based largely on the fact that such transactions need not be recorded in order to protect the conditional seller against third parties who purchase from the buyer even without notice of the existence of the conditional sale."[1]

A conditional sale, under countless decisions in Indiana as well as elsewhere, is any contract for the sale of goods under which possessions is delivered to the buyer and the property in the goods is to vest in the buyer at a subsequent time upon the payment of a part or all of the price, or upon the performance of any other condition or the happening of any contingency; or, it is any contract for the bailment or leasing of goods by which it is agreed that the bailee or lessee is bound to become, or has the option of becoming the owner of such goods upon full compliance with the terms of the contract.

It is fundamental, in the technical conditional sale, that the goods are delivered to the buyer. He is to have the possession and use of the goods while paying for them, performing some other act than payment or awaiting the happening of some event. If the buyer does not receive possession and use of the goods, the transaction has no deceptive features for the public, and there is no need for special rules for the case. It is the element of possession without title but with all the appearances of title which gives rise to the need for special rules, and for this reason at least 34 states have enacted legislation requiring the recording or filing of conditional sale contracts, and many of these have enacted what is called the Uniform Conditional Sales Act. It is of course well established that such contracts need not be recorded in Indiana although it is submitted that there is a pressing need for such legislation.

The retention of title by the seller, notwithstanding possession, use, and appearance of ownership by the buyer, is the characteristic feature of the conditional sale. If the buyer is to have possession and property in the goods also, the transaction cannot be properly called a technical conditional sale, no matter what means

*This paper was read at a recent meeting of the Evans (Ind.) Bar Association by one of the members, Mr. Ollie C. Reeves.

(1) Dunbar v. Rawles (1867), 28 Ind. 225.

of securing the payment of price the seller may adopt, or what acts the seller may expect the buyer to perform later. The passage of property in the goods to the buyer is always subject to a condition precedent.[2] A sale whereby title is to revest in the seller on the happening of a condition subsequent, might also logically be termed a conditional sale; but the term "conditional sale" has acquired a special significance and has come to mean a sale where the passage of title is subject to a condition precedent and not a condition subsequent. For example, it is common for a sale to be made where the seller reserves a right to buy back the goods on the payment of a certain sum or happening of some other event. This is equivalent to a chattel mortgage.

The theory of the Uniform Conditional Sales Act is that the mortgage and conditional sale should be treated alike in the law since they have identical objects and effects.

Frequently the transaction by which goods are delivered for use is called by the parties a "lease" and provides for the payment of "rent;" but the name by which the transaction is called is not of importance and the intent and purpose of the parties will determine.

The buyer, as long as he is not in default, has a right to retain the possession of the goods and the right to acquire the property in the goods on the performance of the conditions of the contract. By this means the buyer who makes payments over a long period of time gets the use of the goods and is thereby aided in paying for the same.[3]

In the absence of a stipulation against such action, the interest of both the seller and buyer is assignable, and the assignees step into the shoes of the assignors.[4]

The question often arises between the conditional buyer and a third party as to whether the buyer has an interest in the goods that is subject to execution. Without giving any very satisfactory reason, it has been held in Indiana that the buyer has no leviable or attachable interest.[5] This result would be easily understood if the creditor sought to make the whole interest in the goods liable for the conditional buyer's debt, but it is not plain what objection there can be to making the special property interest of the buyer, who is in possession, and has so far complied with his contract, liable for his debts. Of course, it may result in substituting another party in the place of the buyer to whom the seller would not have sold the goods, but the seller ought to be satisfied if he gets the price and if the creditor of the conditional buyer does not pay the balance due the seller, the latter ought to be allowed to retake the goods. However, this is not the law, as stated above, in Indiana. The seller may replevin the goods from a sheriff who levies an execution thereon.[6] Of course, the purchaser on the execution sale is in the same position as the levying creditor.[7]

If the conditional seller wrongfully retakes the goods, or wrongfully retains the goods, and thus appropriates to his own use the buyer's special property interest, the buyer may replevin the goods from the seller who prematurely takes them and recover as damages the value of the goods.[8]

If a third person wrongfully injures the goods, while they are in the buyer's possession and he is not in default, his special property right entitles him to maintain an action against the negligent person.[9]

If, according to the terms of the contract, the time has arrived when the entire price or the entire balance of the price has become due, the conditional seller may recover it, whether the buyer has yet become the owner of the goods or not. The buyer

(2) Schneider v. Daniel (1921), 131 N. E. 816.
(3) Tully v. Fairly (1875), 51 Ind. 311.
(4) Tully v. Fairly (1875), 51 Ind. 311; Dunbar v. Rawles (1867), 28 Ind. 225.
(5) Keck v. State (1894), 12 Ind. App. 119.
(6) Hanway v. Wallace (1862), 18 Ind. 377.
(7) Bradshaw v. Warner (1876), 54 Ind. 58.
(8) Isbell v. Brinkman (1880), 70 Ind. 118.
(9) Craig v. Lee (1924), 142 N. E. 399.

has agreed to pay the price at a certain date, or on a certain event. That date has arrived, or that event has happened and the price should be recoverable. And even if the buyer did condition his promise to pay the price on delivery of the goods, or on passage to him of the title to the goods, if the conditional buyer refuses to take delivery and title, the seller may force title on the buyer and collect the price.[10]

In Indiana, where both the contract of conditional sale and the note given for the goods are assigned to a third party, the seller's title, reserved by way of security, is held to pass impliedly to the assignee.[11] But where the note only is indorsed in blank to a third party by the conditional seller such indorsement does not give the indorsee the right to retake the goods on default, since the title to the goods does not pass as an incident of the note. It is submitted that the decision in the latter case is not in harmony with the better reasoned cases, for the right of the seller to collect the price is the principal thing, the reservation of title is only of secondary importance and is for the purpose of enabling the seller to collect the price. When the seller negotiates the note for the price, the title reserved ought to pass as an incident with the note, without express mention of such intent. If the seller no longer owns the note, he no longer has the right to collect the price from the buyer, and the retention of the title by him is useless, whereas it is decidedly useful to the new holder of the note. This view prevails in the majority of the states.

The question often arises as to the priority of liens over the title of the conditional seller. The most frequent cases are those where work is done on automobiles by garagemen at the request of the conditional buyer.

In Atlas Securities Co. v. Grove,[12] an Indiana case, it was held that the burden is on the mechanic who has done work on the automobile to allege and prove that the repairs were necessary and were made with the seller's consent in order to become a lien prior to that of the seller.

In Watts v. Sweeney[13] a common carrier mortgaged a locomotive, which mortgage was to extend over a few years and the engine was to remain in the possession of the mortgagor. It was held that a mechanic rendering necessary repairs for its upkeep could obtain a lien prior to that of the mortgagee, the reason being that in such a case it will be presumed that the mortgagee has constituted the mortgagor in possession his agent to have the necessary repairs made.

The law as laid down in Watts v. Sweeney has not generally been extended beyond courts of admiralty and where public service companies use goods in their business over rather long periods of time. It has always been the law in admiralty that where the owner of a ship mortgages the same, a mechanic doing necessary repairs to the ship has a lien prior to that of the mortgagee. The reasons for this rule lie largely in the conditions which exist at sea and on the ground that such repairs protect the security of the mortgagee. The last case in Indiana involving the priority of claims of laborers or materialmen over the lien of the conditional seller is Pierce v. Blair[14]. Where the court simply held that where the conditional seller of a coal mine sells the same on the condition that the buyer pay a large portion of the profits monthly, derived from the operation of the mine, over a period of years after deducting expenses of mining and where the buyer is simply to have a salary during said operation, the miners working in said mine may have a lien for wages prior to the lien of the conditional seller. In other words, the case is brought within the rule of Watts

(10) Kilmer v. Moneyweight Scale Co. (1905), 36 Ind. App. 568; Gaar v. Fleshman (1906), 38 Ind. App. 490.

(11) Heyns v. Meyer (1910), 46 Ind. App. 45.

(12) 137 N. E. 570 (1922).

(13) 127 Ind. 116.

(14) 148 N. E. 414 (1925).

v. Sweeney, in which case the property mortgaged was also to be used in earning the money with which the mortgage debt was to be paid.

It seems to the writer that the rule as laid down in Watts v. Sweeney and Pierce v. Blair may in some instances be difficult of application and should not be extended beyond the field of public utilities, courts of admiralty and perhaps in cases of sales of coal mines.

The conditional sale of railway rolling stock is regulated in detail by a statute and will not be discussed in this article.[15]

The question often arises just what rights the parties have where property has been sold conditionally and for the purpose of re-sale. In Indiana, in Orner v. Sattley Manufacturing Co.[16] it was held that a reservation of title in a conditional sale for re-sale is valid between the seller and buyer, and the seller may retake the property. But as against a sub-vendee in the usual course of business, such a reservation of title is fraudulent and void.[17]

If the sub-vendee buys in bulk, he is not a purchaser in the ordinary course of business, and where purchase in the ordinary course is a prerequisite to protection, the conditional seller may retake the goods from the purchaser in bulk.[18]

In Andre v. Murray it was also held that such goods could not be levied upon by execution and sold to satisfy the buyer's creditors other than the seller; nor could it be taken by the buyer's trustee in bankruptcy to the prejudice of the seller's claim.

Conditional sale contracts for every kind of chattels often forbid the removal of the goods from a certain place, or the alienation of the buyer's interest, or both. Sometimes the prohibition is absolute and sometimes the qualification is inserted that removal or alienation is to occur only with the seller's written consent.[19] These clauses have been sustained as a reasonable protection of the seller's interest.

Under the Indiana Acts of 1923[20] it is made a felony for the conditional buyer of chattels to sell them or remove them out of the state without the written consent of the seller first obtained.

A breach of the agreement not to remove or alienate without consent is *impliedly* a cause for retaking the goods.[21]

In many cases where the seller has not especially provided for a right to retake the goods, on default, the Courts have found an implication in the contract that such right was to exist. This is especially true in the case of failure to make payment;[22] also in the case of an attempted absolute sale by the buyer;[23] also where there was a violation of a provision against use of the goods other than on certain premises.[24]

But in Indiana, it is a condition precedent to retaking that the seller return to the buyer whatever part payments he has made less damages done to the goods and the value of the use of the same, unless there is a provision in the contract of sale providing for forfeiture of part payments.[25] This is upon the theory that the seller is retaking the goods for his own use and is rescinding the contract.

Where the seller retakes the goods it is upon the notion that there is a rescission of the contract.[26] This is not the theory which prevails in most other jurisdictions. Under the Uniform Conditional Sales Act, the retaking is for security of the seller and for the purpose of foreclosure.

In this state where the seller elects to retake the goods on default of the buyer,

(15) See Burns' R. S. 1914. Sections 5526 to 5530 inclusive.
(16) 18 Ind. App. 122 (1897).
(17) Winchester Wagon Works v. Carman (1886), 109 Ind. 31.
(18) Hench v. Eacock (1898), 21 Ind. App. 444; Lett v. Eastern Moline Plow Co. (1910), 46 Ind. App. 56; Andre v. Murray (1913), 179 Ind. 576, 101 N. E. 81.
(19) Swain v. Schl'd (1917), 66 Ind. App. 156, 117 N. E. 933.
(20) Chapter 126, at page 334.
(21) Dunbar v. Rawles (1867), 28 Ind. 225.
(22) Hodson v. Warner (1877), 60 Ind. 214.
(23) Shireman v. Jackson (1860), 14 Ind. 459.
(24) Dunbar v. Rawles (1867), 28 Ind. 225.
(25) Quality Clothes Shop v. Keeney (1914), 57 Ind. App. 500; 106 N. E. 541.
(26) Green v. Sinker (1893), 135 Ind. 434.

he cannot, after taking the goods, sue the buyer for the balance of the price, the reason being that retaking amounts to a rescission and that the consideration for the promise to pay the price has failed after the buyer has lost possession of the goods, and the seller cannot have the goods and the price also.[27]

It has been held that the mere bringing of suit for the price constitutes an election which prevents the seller from retaking the goods later; the theory being that the seller cannot have both the goods and the price and having brought suit for the price, he thereby indicates an election to abandon his right to the goods and passes title at once to the buyer.[28]

The seller often inserts in the conditional sales contract a clause to the effect that, if the buyer defaults in his payments and the seller exercises his right to retake, all part payments previously made shall be treated as forfeited, or as rental payments, or as payments for damage and depreciation, or as liquidated damages. These clauses have generally been enforced on the theory that the parties might make any contract they desired to make.[29]

A careful study of the law of conditional sales in Indiana, it seems to the writer, reveals a vital necessity for the enactment of the Uniform Conditional Sales Act which has for its purpose the codification of the pre-existing law as it prevails in our most progressive states; and to give recognition to the fact that the results of a conditional sale should be the same as a chattel mortgage requiring recording, providing for the protection of the buyer's equity of redemption and making it impossible for him to barter away such equity to his disadvantage. At least there should be a statute requiring such transactions to be recorded and protecting the buyer's equity against conscienceless repossession on the part of the seller.

(27) Green v. Sinker (1893), 135 Ind. 434; Turk v. Carnehan (1900), 25 Ind. App. 125.
(28) Smith v. Barber (1899), 153 Ind. 322.
(29) Green v. Sinker (1893), 135 Ind. 434.

INSURANCE—AUTOMOBILE TRANSPORTATION CLAUSE

NATIONAL FIRE INS. CO. OF HARTFORD, CONN., v. ELLIOTT

7 Fed. (2d) 522

(Circuit Court of Appeals, Eighth Circuit. July 28, 1925.)

Fire and transportation automobile policy, insuring against perils while automobile was "being transported in any conveyance by land or water, the stranding, sinking, collision, burning, or derailment of such conveyance * * *" held to contemplate a collision of conveyance on which automobile was being carried, and insurer liable, regardless of cause of collision.

Murat Boyle, of Kansas City, Mo. (William S. Hogsett, of Kansas City, Mo., on the brief), for plaintiff in error.

Fred A. Boxley, of Kansas City, Mo., for defendant in error.

SCOTT, District Judge. This is an action at law upon a policy of insurance issued by plaintiff in error, defendant below, covering the automobile of the defendant in error, plaintiff below. The cause was tried upon a stipulation of facts and the testimony of certain witnesses, and the trial court directed the jury to find a verdict in favor of the plaintiff, but submitted to the jury the question of the amount of damage. The jury returned a verdict in favor of the plaintiff in the sum of $2,387, and judgment was rendered thereon.

The defendant below brings the case here on writ of error and has formally assigned nine separate errors. The nine assignments of error, however, in their last analysis, present but two questions, and they are whether either the "transportation clause" or the "collision clause" of the policy cover the contingency out of which the damage to the automobile was sustained.

The policy is designated as a "fire and transportation automobile policy," with a collision clause attached. Under the transportation clause in the policy, the plaintiff is insured "against direct loss or damage, from the perils insured against, to the body, machinery, and equipment of the automobile described herein, while within the limits of the United States (exclusive of Alaska, the Hawaiian and Philippine Islands, and Porto Rico) and Canada, including while in building, on road, on railroad car or other conveyance, ferry or inland steamer, or coastwise steamer between ports within said limits. The following are the perils insured against: (a) Fire, arising from any cause whatsoever,

and lightning; (b) while being transported in any conveyance by land or water, the stranding, sinking, collision, burning or derailment of such conveyance. * * *"

Under the collision clause the policy is extended to cover damage to the automobile and equipment "by being in accidental collision during the period insured with any other automobile, vehicle, or object. * * *" At the trial, after the introduction in evidence of the policy, plaintiff and defendant entered into and agreed to a stipulation of facts by which plaintiff in error admitted the issuance of the policy, the payment of the premium, the waiver of proofs of loss, and the performance by the defendant in error of all conditions precedent or subsequent. The stipulation further provided:

"That at the time said policy was written, and at the time of the damage thereto, plaintiff kept said automobile in a public garage located at Thirty-fifth street and Broadway, in Kansas City, Mo., said garage being known as "Woodlea Garage"; that said garage is a three-story building, with a basement, and the automobiles stored therein are transported from floor to floor by means of an electric elevator; that it was the custom of plaintiff to drive said automobile into said garage when through with its use, and that said garage stored same on the second floor thereof; that, when desiring to use said automobile, plaintiff was accustomed to notify the operators of said garage, who would cause said automobile to be brought from the second floor to the first floor; that on the 13th day of July, 1922, plaintiff ordered her said automobile, being the automobile described in said policy of insurance, for the purpose of a pleasure call; that an employee of said garage drove said automobile onto the elevator on the second floor of said garage building and started the descent of said elevator and said automobile, intending to stop at the first floor, but when midway between the second floor and the first floor of said garage the cables, supports, and apparatus holding and controlling said elevator collapsed and broke, so that said elevator with said automobile upon it dropped with great speed a distance of about 21 feet to the basement floor or bottom of the elevator shaft, the elevator (with said automobile on it) striking the bottom of said shaft with great violence; that said automobile weighed in excess of 4,000 pounds, and by reason of the violent contact of the elevator (said automobile being thereon) with the bottom of said elevator shaft said automobile of plaintiff was bent, twisted, and broken so that the value of the salvage remaining was $300."

Counsel for plaintiff in error, in arguing the case, lays down two propositions: (1) "The damage to plaintiff's car did not result from a peril insured against under the transportation clause of the policy;" and (2) "the damage sustained by the assured to the automobile is not covered under the collision clause in the policy."

Preliminary to addressing themselves to the above questions, counsel have laid down and discussed certain principles which it is contended should guide the court in its interpretation of the language of the policy. Counsel say: "In construing a written contract, the words employed will be given their ordinary and popularly accepted meaning, in the absence of anything to show they were used in a different sense," citing 13 C. J. 531.

Counsel further say: "As a corollary to the above proposition, we desire to emphasize the rule that an insurance contract is to be construed in the same manner and according to the same fundamental rules as any other contract."

Supporting these preliminary observations, counsel say: "In the case of Imperial Fire Insurance Co. v. Coos County, 151 U. S. 452, 463, 14 S. Ct. 379, 381 (38 L. Ed. 231), it was said: 'But the rule is equally well settled that contracts of insurance, like other contracts. are to be construed according to the sense and meaning of the terms which the parties have used, and, if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular sense.' The above quotation has been many times cited by this court, notably in Standard Life & Accident Insurance Co. v. McNulty, 157 F. 224, 85 C. C. A. 22; McGlother v. Provident Mutual Accident Co., 89 F. 685, 32 C. C. A. 318; Hawkeye Commercial Men's Association v. Christy (C. C. A.), 294 F. 208."

Other cases are cited and quoted to the same effect. And again counsel say: "In the case of Hawkeye Commercial Men's Association v. Christy, 294 F. 208, 210, this court, in referring to the decision of the Supreme Court in Imperial Fire Insurance Co. v. Coos County, 151 U. S. 452, 14 S. Ct. 379, 38 L. Ed. 231, said in that case: 'The Supreme Court * * * sharply called a halt to the tendency at that time to treat contracts of insurance as a separate class. to be interpreted by the rule that, if the meaning of the contract were doubtful, the construction should be adopted which was most favorable to the assured, and to be assiduous to discover such a doubt'."

We have no disposition to combat the principles of law stated and quoted by counsel for plaintiff in error. We accept these principles as fundamental and well settled. It does not fol-

low, however, that courts will refrain from considering the entire context and subject-matter in determining the meaning and application of specific words and expressions. On the contrary, courts will carefully consider these matters, and particularly when the subject or class of instruments are of recent origin and use. Neither does it mean that courts will always give to words and expressions their "most" usual application, for to do so would necessarily be to adopt a restricted application. A certain amount of elasticity is necessary in the application of old expressions to new subjects.

With these principles in mind we are to determine what the perils were that were covered by the transportation clause of the policy. The provision is: "(a) Fire, arising from any cause whatsoever, and lightning; (b) while being transported in any conveyance by land or water, the stranding, sinking, collision, burning, or derailment of such conveyance. * * *"

From the nature of this provision there is necessarily a paucity of judicial precedents to guide us in our considerations. This no doubt results from the novelty of transporting one vehicle upon another with any great frequency. Motor vehicles are in themselves comparative new vehicles. The custom of traveling long distances in vehicles propelled by their own power, and transporting them upon railroad cars, ships, and ferryboats, is of comparative recent origin. What few court decisions there are upon the subject most usually involve interpretation of the so-called collision clause of policies; that is, where the automobile or motor vehicle in question comes in violent contact with some object through its own momentum, rather than being injured and damaged by the collision of the conveyance upon which it is being transported. These cases are, however, in a measure helpful, as they do, of course, involve the question of what is a collision in the circumstances.

Considering the question before us from a literal standpoint, what are the factors involved in the transportation clause of this policy?

First, the injured vehicle must have been in the act of being "transported." Counsel in the instant case have raised no question as to the meaning of that term; indeed, in their stipulation in this case they themselves adopt the same expression, agreeing that the building in which the accident occurred was one in which "automobiles stored therein are transported from floor to floor by means of an electric elevator." So we assume that defendant in error's automobile was being transported.

Second, the automobile must have been in the course of transportation in a "conveyance." What is a conveyance? Webster defines a conveyance as a vehicle, "the instrument or means of carrying or transporting anything from place to place." A vehicle, according to Bouvier's Law Dictionary, "includes every description of carriage or other vehicle or contrivance used or capable of being used as a means of transportation on land."

In Orcutt v. Century Bldg. Co., 201 Mo. 424, 99 S. W. 1062, 8 L. R. A. (N. S.) 929, the court said. "A person or corporation operating an elevator to transport persons or property from one floor to another of a building, is as much a carrier as is a person or corporation operating a railroad or stage coach."

So we may assume that the elevator in question was a conveyance, and, not being used upon or in connection with any body of water, it was by land literally.

Third, the one contingency applicable in the instant case, if any, is designated by the expression "collision." What is a collision? Webster says it is the "act or instance of colliding." Now the etymology of the word "collide" is "col" plus "lædere." "Col," Webster says, is an assimilated form of "com," and that "com" means "together," and that the Latin word or form "lædere" means "to strike." Therefore collision, as stated in the Standard Dictionary, means "to strike together." In the instant case the next inquiry is: What must strike together? Manifestly two objects of some kind. The elevator was certainly an object. Quære: Was the "basement floor or bottom of the elevator shaft" another object? In considering the collision clause of similar policies, some courts have had occasion to consider somewhat similar questions. And it would seem that in the instant case this very point is, in the last analysis, the determining one.

The New Jersey Supreme Court, in Harris v. American Casualty Co., 83 N. J. Law, 641, 85 A. 194, 44 L. R. A. (N. S.) 70, Ann. Cas. 1914B, 846, said: "Water and land are 'objects', and an automobile which runs into either or both 'collides' with an object or objects." It would seem that for other and stronger reasons the shaped and prepared bottom of the elevator shaft on the floor of a basement is an object, when considered in opposition to the descending elevator. So it would seem beyond question that, so far as the letter of the policy is concerned, the automobile in question was damaged "while being transported in a conveyance by land" through the "collision" of such conveyance.

But counsel for plaintiff in error insist that such an interpretation would not be in accord with the plain, ordinary, and popular sense of

the expression "collision," and upon this point we must concede that the courts are not in entire agreement. Some courts have given more breadth and elasticity to the expression "collision" than others. Counsel for plaintiff in error urges decisions of the Supreme Courts of Wisconsin, California, Texas, and Washington as sustaining their contention, while counsel for defendant in error cite the decisions of the Supreme Courts of New Jersey, New York, Illinois, Pennsylvania, Indiana, and Michigan.

Bell v. American Insurance Co., 173 Wis., 533, 181 N. W. 733, 14 A. L. R. 179, cited by plaintiff in error, was an action to recover damages on an insurance policy insuring plaintiff against damage to his automobile on account of being an accidental collision with "any other automobile, vehicle, or object." We quote the facts from the opinion in the case: "On the 14th day of September, 1919, plaintiff was driving his automobile down Twenty-first street in the city of Superior. He turned on Logan avenue, with the intention of backing out and turning around. He had crossed the crosswalk by 6 or 8 feet, and practically stopped his car, the power being in neutral, preparatory to backing out. One side of the car gradually settled into the ground and the car tipped over. Plaintiff seeks to recover the damage resulting to the car by its coming into contact with the ground at the time of the upset." Plaintiff recovered in the lower court, and on appeal the Supreme Court of Wisconsin reversed the lower court, holding that the term "collision" did not include mere contact with the ground on the tipping over of the car. We quote that portion of the opinion indicating the view of the Wisconsin court:

"The term 'collision' has not received frequent consideration by courts. A number of cases in which the term has been considered have been collated by the industry of counsel and cited to our attention. We here preserve a reference to the following for the future convenience of bench and bar: Newtown Creek Towing Co. v. Ætna Ins. Co., 163 N. Y. 114, 57 N. E. 302; London Assurance v. Companhia, 167 U. S. 149, 17 S. Ct. 785, 42 L. Ed. 113; Cline v. Western Assurance Co., 101 Va. 496, 44 S. E. 700; Harris v. American Casualty Co., 83 N. J. Law, 641, 85 A. 194, 44 L. R. A. (N. S.) 70, Ann. Cas. 1914B, 846; Hardenbergh v. Employers' Liability Co., 80 Misc. Rep. 522, 141 N. Y. S. 502; Stuht v. U. S. Fidelity & Guaranty Co., 89 Wash. 93, 154 P. 137; O'Leary v. St. Paul Fire & Marine Ins. Co. (Tex. Civ. App.) 196 S. W. 575; Graham v. Ins. Co., 220 Mass. 230, 107 N. E. 915. None of these cases, however, deal with a situation similar to the one here presented, unless it be Harris v. American Casualty Company, supra. That case was referred to in Wettengel v. United States 'Lloyds,' 157 Wis. 433, 147 N. W. 360, Ann. Cas. 1915A, 626, where it was said that it had but advisory value in this court, and its soundness was doubted. A further consideration of the subject does not remove the doubts there expressed.

"For the purpose of showing a practical construction of the contract on the part of the company, the plaintiff proved by the agent who delivered the policy in question that the company provided, and sometimes used, another form covering the damage resulting from collision, which specifically excluded 'damage caused by striking any portion of the roadbed or by striking the rails or ties of street, steam, or electric railroads.' It is argued that because in some instances the company used a form specifically excluding damage caused by striking any portion of the roadbed, or by striking the rails or ties of street, steam, or electric railroads, a purpose is indicated to assume responsibility by the use of the one form for damage excluded by the express terms of the other. Without stating whether, in our opinion, this testimony proves, or tends to prove, a practical construction of the contract here in question by the company, we are clear that it does not tend to prove a practical construction in harmony with that for which respondent contends. As we construe the clause quoted, it has no reference to damage caused by upsets, but it does exclude damage caused by projecting portions of the roadbed in the course of travel. It is common knowledge that an automobile traveling along a highway frequently strikes an unevenness of surface in the roadbed sufficient to do damage to the automobile, and this, we think, is the damage excluded by the clause in the other form sometimes used by the company. Such circumstances were held not to constitute a collision in Doherty v. Ins. Co., 38 Pa. Co. Ct. R. 119. * * *"

Moblad v. Western Indemnity Co., 53 Cal. App. 683, 200 P. 750, was decided by the District Court of Appeal, First District, California. In that case "the driver of said automobile, to avoid striking another automobile, swerved to the outer edge of the roadway, and said roadway gave way, causing said automobile to run down an embankment, and, after leaving said roadway, to overturn, and roll down the side of a mountain; that plaintiff's said automobile did not strike or collide with any object upon the said roadway, nor did said automobile strike or collide with any object upon the said embankment or mountain side prior to the time said automobile overturned."

The court then said: "We are cited to no case in this state where the facts are similar to the facts of the present case, but our attention has been called to the recent case of Bell v. American Ins. Co. [173 Wis. 533] 181 N. W. 733 [14 A. L. R. 179]."

The court then quotes with approval from that case, and, continuing, says: "In the instant case, the damage to plaintiff's car was caused proximately by its turning over on the edge of the road. Its subsequent revolutions and consequent damage were but the operation of physical laws set in motion when it turned over on the edge of the road. The proximate and only cause of the accident was, not a collision, but the upsetting of the automobile."

Ploe v. International Indemnity Co., 128 Wash. 480, 223 P. 327, 35 A. L. R. 999, was a case very similar in its facts to the Moblad case just referred to. The Washington court apparently followed the Moblad case, holding that, where the automobile got beyond the control of the driver and left the road, striking a stump, capsized, and rolled to its destruction, there was no collision within the meaning of the policy, which insured against "collision with another automobile, vehicle, or object."

Harris v. American Casualty Co., decided by the New Jersey Court of Errors and Appeals, 83 N. J. Law, 641, 85 A. 194, 44 L. R. A. (N. S.) 70, Ann. Cas. 1914B, 846, adopts a very liberal interpretation of the term "collision." In that case the policy covered loss or damage "resulting solely from collision with any moving or stationary object." Plaintiff's automobile was being driven over a bridge on a highway. The sides of the bridge were protected by guard rails. The car crashed through the rail on one side and was precipitated into the stream below. The machine turned upside down after leaving the bridge, and rested in an inverted position in the bed of the stream. We quote from the opinion:

"As there could have been no collision without the presence of an object with which to collide, we will first consider whether the water of the stream and the earth beneath it were objects within the meaning of the policy. The Standard Dictionary defines 'object' as 'anything which comes within the cognizance or scrutiny of the senses; especially anything tangible or visible; * * * anything, whether concrete or abstract, real or imaginary, than may be perceived or apprehended by the mind; that of which the understanding has knowledge.' Water and land, therefore, are objects—physical objects. They are not abstract or imaginary, but tangible, visible, concrete, and real, and may be perceived and apprehended by the mind; the understanding has knowledge of them.

"'Collision' means the act of colliding; a striking together; violent contact. See Standard Dictionary. The Supreme Court of the United States in London Assurance Co. v. Companhia De Moagens Do Barreiro, 167 U. S. 149, at page 155, 17 S. Ct. 785, at page 787, 42 L. Ed. 113, at page 119, speaking to the subject of collision in admiralty law, said: 'As to the first, we think that the vessel was "in collision" within the meaning of the language used in the certificate which represented and took the place of the policy. It was not necessary that the vessel should itself be in motion at the time of the collision. If, while anchored in the harbor, a vessel is run into by another vessel, it would certainly be said that the two vessels had been in collision, although one was at anchorage and the other was in motion. * * * It is impossible, as we think, to give a certain and definite meaning to the words "in collision," or to so limit their meaning as to plainly describe in advance that which shall and that which shall not amount to a collision, within the meaning of this policy'."

The court, following the reasoning quoted, held that there was a collision, and that the accident came within the provision of the policy, reversing the trial court.

Polstein v. Pacific Fire Ins. Co., decided by the City Court of New York, reported in 122 Misc. Rep. 194, 203 N. Y. S. 362, is similar in its facts to Ploe v. International Indemnity Co., supra, and the court, in deciding the case, reaches a diametrically opposite conclusion, holding that the impact with the rock at the bottom of the embankment was a collision.

Hardenburgh v. Employers' Liability Assurance Corporation, also decided by the City Court of New York, 78 Misc. Rep. 105, 138 N. Y. S. 662, was very similar to the Polstein Case, supra, and it was there held that the impact with the shoulder of the roadbed was a collision.

Lepman v. Employers' Liability Assurance Corporation, 170 Ill. App. 379, was a case where the automobile was injured by collision with a brick. There was a verdict and judgment for the plaintiff, and the case was affirmed on appeal.

Southern Casualty Co. v. Johnson, 24 Ariz. 221, 207 P. 987, was a case where the automobile was being driven upon a highway, and the driver, to avoid collision with another car, swerved the car to the side, when it left the road and ran against an embankment. After reviewing many of the cases herein cited, including the California and Wisconsin cases, the

court held that there was a collision within the meaning of the policy.

Universal Service Co. v. American Ins. Co., 213 Mich. 523, 181 N. W. 1007, 14 A. L. R. 183, was a case in which a motor truck was struck by a falling scoop of a steam shovel. It was held in that case that there was a collision within the meaning of the policy.

It will be observed that all of the cases referred to are cases under the collision clause of the policy sued on, and some of them would seem to turn upon a consideration of the question whether the collision or the mere tip-over of the car before or after the collision was the proximate cause of the damage. That factor, however, is not present in the instant case. The question now being determined is, not whether the collision clause of the policy is applicable, but whether the transportation clause covers the situation. That clause does not contemplate the damage to the car by reason of an impact while the automobile is moving on its own power or momentum, or whether injured by any moving object. It contemplates the collision of the conveyance upon which the automobile is being carried, and the insurance company would be liable, regardless of the cause of such collision.

After a careful review of the cited cases we are constrained to the conclusion that there was a collision of the elevator with the bottom of the elevator shaft within the meaning of the policy sued on, and that the trial court committed no error.

The question as to whether the incident and damage in controversy is covered by the collision clause of the policy is not directly presented on this record by any assignment of error. The trial court held that the accident was not within the collision clause of the policy. But, this ruling being in favor of plaintiff in error here, no assignment was made by it. Defendant in error, however, attempts to assign error on her brief for this ruling. This court is without jurisdiction to consider that question on the assignment of the defendant. Cross-errors are not assignable in the federal courts. Guarantee Co. of North America v. Phenix Ins. Co., 124 F. 170, 59 C. C. A. 376. Whether we might consider this question under plaintiff in error's assignment, upon the authority of Ramsay v. Crevlin, 254 F. 813, 166 C. C. A. 259, had we determined that the accident was not within the transportation clause, becomes academic, and we find it unnecessary to decide in this case whether the accident was covered by the collision clause of the policy in question, inasmuch as the case must be affirmed on the holding that the accident was covered by the transportation clause.

The case is therefore affirmed.

NOTE—*Automobile Damaged by Falling of Elevator, as Within the Transportation Clause of Insurance Policy.*—The reported case seems to be one of first impression so far as the facts are concerned.

The case of Frieberger v. Globe Indemnity Company, 199 N. Y. Supp. 310, is a case very similar to the reported case in some respects. In this case the insured drove his car on an elevator at a garage and the elevator fell from the second floor to the pit, damaging the car. The policy covered loss or damage "caused solely by accidental collision with another object, either moving or stationary." It was held that the damage was covered by the policy. It was further held that the elevator was not a "conveyance by land or water," within a restrictive provision of the insurance law of that State.

ITEMS OF PROFESSIONAL INTEREST

MAGNA CHARTA DAY

The International Magna Charta Day Association is a movement to develop English speaking patriotism and co-operation by linking the English speaking nations still more closely together, thus aiding world peace; and by arousing our race consciousness, making it more difficult for unwise racialism to develop, and for our enemies to sow trouble among us.

This movement was begun in St. Paul, Minnesota, many years ago for the broad purpose of urging the English speaking nations to commemorate annually the common origin of their liberties in the observance of June 15 as Magna Charta Day, but not as a legal holiday. Among churches and Sunday schools the third Sunday in June is observed as Magna Charta Sunday. The support of the press is vital and most earnestly requested. Public school teachers are urged to impress upon their pupils the importance and significance of the day.

Our nations, with their common responsibilities and "common dangers," against which Hon. Elihu Root solemnly warns us; with so great a destiny from their vast potential development must work more closely together.

The Association announces that the Rt. Hon. the Earl of Kintore, K. T., G. C. M. G., has honored the Association by accepting the Honorary Vice-Presidency for Great Britain.

The Hon. Patrick McMahon Glynn, K. C., B. A., LL. B., etc., Adelaide, has accepted the Honorary Presidency for Australia.

The Hon. Col. A. H. MacKay, Esq., LL. D., F. R. S. C., B. A., B. Sc., is the new Executive Vice-President for the Dominion of Canada.

The Association has been especially honored by a thought-compelling paper on Magna Charta by W. S. Holdsworth, Esq., K. C., D. C. L., F.

B. A., Vinerian Professor of English Law in the University of Oxford, and author of "A History of English Law."

The support given the Association this year has been exceptional and plans are under way for next year which will be of definite value to the movement, and for all that it represents.

J. W. HAMILTON,
Founder and Executive Secretary,
147 Kent St., St. Paul, Minn.

BOOK REVIEWS

BAUER AND DILLAVOU—CASES ON BUSINESS LAW

Cases on Business Law, covering bailments and carriers, security rights, property, insurance, banking, bankruptcy, crimes, regulation, and containing a dictionary of legal terms has just been published by West Publishing Company. The authors are Ralph S. Bauer, Professor of Law, De Paul University, Chicago, formerly Assistant Professor of Business Law in the University of Illinois, and Essel Roy Dillavou, Assistant Professor of Business Law, University of Illinois. The book contains 1024 pages and is bound in buckram.

"It is the purpose of the present volume to do for the study of other subjects of business law by students in colleges of commerce what has already been done in contracts, agency, negotiable instruments, sales, partnership, and corporations by Britton and Bauer's Cases on Business Law. Since the publication of the latter work, the authors of the present book have developed, at the University of Illinois, a course that carries the same general type of treatment through all of the other important subjects of Business Law. The present book is the outgrowth of the development of that course. The success of the previous volume, and the popularity of the second course, have led the authors to believe that this book fills a need no less real than that supplied by the first volume. The subjects perhaps almost universally regarded as fundamental have been covered in the earlier volume; yet subjects of great practical importance are treated in this one. In fact, many good students have said that some of the most practical help that they have received from their work in business law has come from this second course."

NOTES TO INDIANA STATUTES

The Notes to the Statutes of Indiana, 1924, edited by Emerson E. Ballard, A. M., are published by the National Annotating Company, Crawfordsville, Indiana. This volume covers all the decisions of the Indiana Supreme and Appellate Courts published in the Northeastern Reporter during the year 1924, to which have been added references to current decisions of the courts of other states and other notes and articles contained in the current volumes of American Law Reporter and Central Law Journal.

The first number of Notes to Statutes of Indiana was published in January, 1903. With the present volume there is announced the beginning of a new series of Notes to Statutes. No change has been made in the arrangement of the contents or manner of publication. The scope of the work, however, has been enlarged so as to include all of the points in all the current Indiana cases, whether the subject matter be common law or statutory. The object of this work is to furnish the Indiana lawyer a hand-book containing an exhaustive epitome of every point in every current Indiana Case, the contents of which are presented in a single unit, so arranged that if a lawyer has his mind either on a section of the Statutes or any topic, he can locate the point without confusion or delay.

That the lawyers have appreciated this work, is shown by its very general and extensive use by the profession. It is of such a practical nature that no Indiana lawyer, nor any other lawyer having anything to do with the law of that state, can afford to be without it. Its value and usefulness is well established, and a knowledge of its purpose and of the perfection with which it meets that purpose is the only prerequisite to a demand for the book.

COOK—CASES ON EQUITY

Volume 2

Volume 2 of Cases on Equity by Walter Wheeler Cook, Professor of Law, Yale University, has just been published by West Publishing Company. The book belongs to the American Case Book Series, consists of 900 pages, and is bound in dark green buckram. This volume covers the specific performance of contracts, and its table of contents shows the following:

Chapter I. The General Scope of the Remedy of Specific Performance: 1. Historical Note. 2. Inadequacy of Damages as a Remedy for Breach of Contract. 3. The Feasibility of Enforcing Specific Performance (Herein of Certainty in the Terms of the Agreement). 4. Mutuality and Lack of Mutuality: a. Mutuality as a Reason for Decreeing Specific Performance.

b. Lack of Mutuality as a Reason for Denying Specific Performance. 5. Necessity for Consideration.

Chapter II. The Fulfillment of Conditions, Express and Implied (Herein of Laches and the Statute of Limitations): 1. Conditions, Express and Implied. 2. Marketable Title. 3. Laches and the Statute of Limitations. 4. Partial Performance with Compensation. 5. Damages in Lieu of Specific Performance.

Chapter III. Part Performance and the Statute of Frauds.

Chapter IV. Equitable Conversion by Contract.

Chapter V. Equitable Servitudes.

Chapter VI. Misrepresentation, Mistake and Hardship as Defenses to Specific Performance: 1. Misrepresentation. 2. Mistake. 3. Hardship.

COSTIGAN—CASES ON TRUSTS

The West Publishing Company, St. Paul, has just issued a Volume of Cases on Trusts by George P. Costigan, Jr., Professor of Law, University of California, and Author of Case Books on Wills, Legal Ethics, Contracts, etc. This volume belongs to the well known American Case Book Series. It consists of 997 pages and is bound in dark green buckram. We quote the following concerning the arrangement and treatment of the subjects covered:

"The special editor has accepted the judgment of Professors Ames and Scott as to the topics to be covered in a casebook on Trusts. Charitable trusts, added by Professor Scott, are treated in this book in the section on Cestui Que Trusts in chapter II on the Elements of a Trust. What few departures from previous case book contents have been made will be readily ascertained from the table of contents. This casebook differs from the other casebooks on Trusts primarily in the selection made from the enormous mass of available material and in the arrangement of what has been selected.

"Because they constitute a very valuable part of the course on Trusts, the distinctions between trusts and other relations are quite fully covered. In the very first footnote, Lord Bacon is quoted as approving the drawing of such distinctions as the proper method of approaching the subject, and that is the method followed here. Those teachers who prefer to start at some other point, however, will find it quite easy to make any rearrangement of material which to them may s m desirable.

"Because resulting and constructive trusts are practically important, and theoretically both interesting and difficult, they are given considerable space. In the first edition of his casebook, Professor Ames found it desirable to emphasize them, and, since then, they have grown in practical importance. In this casebook, the effort has been made to present both characteristic constructive and resulting trust problems and a wide variety of them.

"Because of the complication of the subject of Trusts, the compilers of casebooks on Trusts have never felt obliged to conceal as much knowledge as possible from students, but, on the contrary, by rather full footnotes have endeavored to give the students considerable of the information and material needed for the presentation and intelligent classroom discussion of trust problems. This is especially true in regard to cases, such as those concerned with bank collections, which are included in the casebook because of the very great desirability of discussing them from the trusts' viewpoint. In this casebook, as in its predecessors, an effort has been made to assist both teacher and student by furnishing in the footnotes that information which, if the teacher had to supply it, would delay him unnecessarily and undesirably in getting at the problems to be discussed. Many valuable articles in periodicals and other monographic treatments of topics are cited in the footnotes. Experience alone can demonstrate whether the footnotes accomplish their purpose in a way to meet with sound approval."

ENGLISH POLITICAL INSTITUTIONS

The Honorable J. A. R. Marriott is the author of the book entitled as above, published by the Oxford University Press, American Branch, New York. The book purports to be an introductory study of English Political Institutions. This is the third edition of the work, the first having been published in 1910, and the second in 1912.

In a recent civil service examination for men to join the Los Angeles police force, the following are some of the actual answers given to the questions asked:

Question: "What would you do in a case of race riot?"

Answer: "Get the number of both cars."

Question: "What is sabotage?"

Answer: "Breaking the laws of the Sabbath?"

Question: "What are rabies, and what would you do for them?"

Answer: "Rabies are Jewish Priests, and I would not do anything for them."—Yankee Doings.

—Exchange.

DIGEST

Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this Digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Adverse Possession**—Location of Land.—Where tract of land consists of more than 5,000 acres possession by one other than owner of the land separately inclosed by fence could not, under Rev. St. arts. 5677, 5678, have been adverse to title of one acquiring land from owner.—Carver v. Moore, Tex., 275 S. W. 90.

2. **Attachment**—Return of Writ.—Deputy sheriff who signed return of writ of attachment in sheriff's name held competent to make return, notwithstanding he was shown to have been personally unacquainted with facts, in view of Pol. Code, § 4171, duty of returning writ being an official, not personal, duty.—Colver v. W. B. Scarborough Co., Cal., 238 Pac. 1104.

3. **Attorney and Client**—Quantum Meruit.—Attorney, who for more than two years unsuccessfully endeavored to increase client's interest in particular estate, pursuant to contract providing for contingent fee, held not entitled, on client's termination of contract, to recover on quantum meruit for services rendered, nor for traveling and living expenses incurred.—Fletcher v. Kellogg, U. S. C. C. A., 6 Fed. (2d) 476.

4. **Automobiles**—"Vehicle."—In view of fact that, in titles to acts regulating automobiles, Legislature adopted term "vehicle" to indicate all conveyances, excepting those whose motive power was animal, in view of Code 1919, §§ 2138, 2139, 2140, regulating speed of automobile passing horse or other vehicle which had stopped, applies to speed in passing automobile which had stopped.—Stanley v. Tomlin, Va., 129 S. E. 379.

5. **Bankruptcy**—Adjudication.—Adjudication in bankruptcy against partners held not warranted, in absence of proof that firm assets, together with assets of individual partners, available for firm debts, were insufficient to meet firm obligations.—Baker v. Bates-Street Shirt Co., U. S. C. C. A., 6 Fed. (2d) 854.

6.——Attorneys' Fees.—Where an involuntary petition has not been held invalid or insufficient, and the attorneys for petitioners have done their full duty, and conducted the case with the usual professional skill and ability, it is error to divide the "one reasonable fee" allowable to the attorneys for petitioning creditors, under Bankruptcy Act, § 64b, between them and attorneys for intervening creditors who appear and join in the petition.—In re Diamond Fuel Co., U. S. C. C. A., 6 Fed. (2d) 773.

7.——Composition.—Failure to pay notes given under composition agreement under Bankruptcy Act (Comp. St. § 9585-9656) does not revive original debts.—In re Clarence A. Nachman Co., U. S. C. C. A., 6 Fed. (2d) 427.

8.——Expenses.—Creditor, who petitioned for appointment of receiver and made no objection to court's appointment of marshal to take charge thereof and without objection under order of court paid marshal for expenses incurred in caring for property, was not entitled to recover money from marshal, even if court had no jurisdiction to order such payment, where he made no effort to be reimbursed for more than two months after marshal turned over property to trustee, and did not file petition seeking reimbursement until after estate had been administered, property distributed, and trustee discharged.—In re Kessler, U. S. C. C. A., 6 Fed. (2d) 872.

9.——Lien.—Where sheriff levied execution within four months of filing of petition in bankruptcy, but never took possession or protested exercise of possession by trustee and his agent, bankruptcy court had jurisdiction to declare invalid lien claim of sheriff and judgment creditor as without color of right, without delay of useless plenary suit.—Heise v. McMullen, U. S. C. C. A., 6 Fed. (2d) 462.

10.——Payment of Creditor.—Creditor, taking transfer or payment after filing of bankruptcy petition and on account of pre-existing debt, takes it subject to avoidance by trustee, if and when appointed, in view of Bankruptcy Act, §§ 60b, 70.—Grand Rapids Dry Goods Co. v. Ostendorf, U. S. C. C. A., 6 Fed. (2d) 506.

11.——Preference.—Though bankrupt's liabilities were about twice amount of assets, a creditor who was paid 48 per cent. of its claim shortly before bankruptcy received a preference, since if preference were upheld, creditor could still claim balance of debt and share with others in distribution.—Commerce-Guardian Trust & Savings Bank v. Devlin, U. S. C. C. A., 6 Fed. (2d) 518.

12.——Replevin.—Referee was without jurisdiction to grant order staying replevin action in state court against bank holding securities pledged to secure bankrupt against loss, where securities were at all times in bank's possession and litigation in state court did not involve possession of securities, but sought merely personal judgment against bank for value thereof, after showing that they were clear in bank's hands.—Park v. Stryker, U. S. C. C. A., 6 Fed. (2d) 457.

13.——Sheriff's Sale.—In the absence of either fraud or collusion between a corporation and its execution creditors, or other invalidity of judgments, on which such executions issued, a trustee in bankruptcy held not entitled to prevent a sheriff's sale of the corporate franchises and property of such corporation, shares of stock in which constituted the chief assets of the bankrupt.—In re Howell, U. S. C. C. A., 6 Fed. (2d) 672.

14.——Tax Refund.—Bankrupt's unliquidated claim against treasury department for refund of excess income tax payments held a "right of action" arising from unlawful taking of bankrupt's property, vesting in trustee under Bankruptcy Act, § 70, par. 6 (Comp. St. § 9654), notwithstanding right was unassignable by virtue of Rev. St. § 3477 (Comp. St. § 6383); "right of action" being a formal demand by one upon another, in assertion of legal or equitable right, insisted upon in proper tribunal.—Chandler v. Nathans, U. S. C. C. A., 6 Fed. (2d) 725.

15. **Banks and Banking**—Collecting Checks.—Where checks were indorsed in blank and deposited for transmission and collection, and bank credited customer's account, subject to right to charge checks back if payment was not received, title to checks was not transferred to bank.—First Nat. Bank v. Federal Reserve Bank, U. S. C. C. A., 6 Fed. (2d) 339.

16.——Collecting Payment for Deed.—Where customer forwarded a deed to a bank with instructions to deliver when cash was paid, and bank took a check which was not made good, bank later failing, held, that he was not an unsecured depositor or holder of exchange in good faith, within Rev. Code 1919, § 9020, amended by Laws 1921, c. 134, § 1, which provides the method of certifying claims of depositors since the facts showed a relationship of principal and agent.—Parsons v. Smith, S. D., 205 N. W. 37.

17.——Misapplication of Funds.—Where bank received proceeds of wheat crop knowing they belonged one-half to plaintiff and one-half to purchaser of land, and promised to deposit plaintiff's share to his account, but instead paid to purchaser or his order more than his share, bank was liable to plaintiff for portion of share not received as for money had and received.—Cole v. Canadian Bank of Commerce, Ore., 239 Pac. 98.

18.——Ownership of Draft.—A draft, though payable to the order of the bank forwarding it "for collection and credit," taken in connection with the bill of lading attached, bearing on its face unmistakable evidence that it was for purchase price of

cotton sold by drawer to drawee, together with specific instruction, contrary to usual custom and course of business, that it should be credited to sender's account only when collected, held sufficient to put collecting bank on notice that forwarding bank was not owner of draft.—National Shawmut Bank of Boston v. Barnwell, Miss., 105 So. 462.

19. **Bills and Notes**—Acceleration Clause.—Where the acceleration clause in a promissory note leaves it optional with the holder to declare the whole amount due upon failure to pay any installment of principal or interest, the holder cannot, without presentment for payment, exercise his option to declare the whole amount due, if no specific place of payment is expressed in the note until it has been presented to the payor at the latter's known place of business.—Griffin v. Reilly, Tex., 275 S. W. 242.

20.——Holder in Due Course.—Under Negotiable Instruments Law, § 51, making value for transfer of note any consideration sufficient to support simple contract, bank, purchaser of note, title to which was defective, was entitled to recover actual cash advanced thereon in ignorance of defect as to title of note.—First Nat. Bank v. Moir, N. Y., 211 N. Y. S. 482.

21. **Brokers**—Commission.—In an action by a real estate broker to recover the amount of his commission, it is immaterial that the owner sold the property himself. If, after the property is listed with the broker for sale, he introduces the purchaser to the owner, and through such introduction negotiations are begun by the owner, and the sale of the property is made to such purchaser by the owner, the broker is entitled to his commission.—Abraham v. Wasaff, Okla., 239 Pac. 138.

22.——Delivery of Stocks.—Refusal of stockbroker to deliver on demand to customer stocks held on margin, free from lien or claim, establishes on part of stockbroker duty to pay fair market value, and customer can maintain action of contract therefor.—Pizer v. Hunt, Mass., 148 N. E. 801.

23. **Carriers of Goods**—Furnishing Cars.—In view of Interstate Commerce Act (U. S. Comp. St. § 8563 et seq.), an interstate carrier cannot guarantee refrigerator car at particular time and place, for transportation of common commodity as such contract would create advantage and preference not available to all, and not provided for in published tariffs.—American Ry. Express Co. v. Peninsula Produce Exch., Md., 130 Atl. 346.

24.——Valuation.—Where express company agent, in good faith, after conversation with shipper's agent, who had no clear knowledge of worth of parcel, valued it at $50 in receipt, which was delivered to and became binding on sender, and charged rate fixed on such valuation, the company was not liable on loss of package for amount greater than valuation fixed in receipt, though sending agent was not shown to have known that lower valuation would secure lower rate, and though carrier knew agent was ignorant of true value, and in action to recover greater amount it was error to exclude schedule filed with Interstate Commerce Commission, showing graduated rates based on valuations.—American Ry. Express Co. v. Daniel, U. S. S. C., 46 S. Ct. 15.

25. **Chattel Mortgages**—Stock of Goods.—Chattel mortgages on stocks of goods in canning factory, by which mortgagor agreed to keep on hand at least a certain amount of stock held not to include canned goods moved to factory from another which had been destroyed by fire.—West Michigan Sav. Bank v. Dater, Mich., 205 N. W. 113.

26. **Constitutional Law**—Debt of City.—Acts 38th Leg. Tex. (1923), c. 142, giving remedy for collection of debt of city existing before its incorporation was by court declared void, does not invade property rights, and is not retrospective, within inhibition of Texas Constitution.—City of Sour Lake v. Branch, U. S. C. C. A., 6 Fed. (2d) 355.

27.——Full Age.—Statutes fixing full age or legal majority affect personal status of persons coming within them and validity of their contracts, and are not merely procedural or remedial laws, and hence Laws 1921, p. 399, raising full age of females, if applying to those over 18 when it was enacted, would violate Const. art. 2, § 15, and impair obligation of their contracts.—Nahorski v. St. Louis Electric Terminal Co., Mo., 274 S. W. 1025.

28. **Contracts**—Restraint of Competition.—A contract, providing that plaintiff would sell his wheat to the defendant association only and would pay 25 cents per bushel to defendant as damages, if he sold to anyone else, is void as in restraint of competition and harmful as matter of law.—Atkinson v. Colorado Wheat Growers' Ass'n, Col., 238 Pac. 1117.

29. **Corporations**—Quorum at Directors' Meeting.—Stockholder, present at meeting for election of directors solely for purpose of protesting against its legality, and who, because of persistency of his protest, was ejected before any votes were received, held not present at meeting in sense that his stock and proxies held by him could be counted in determining whether a quorum was present.—Leamy v. Sinaloa Exploration & Development Co., Del., 130 Atl. 282.

30.——Sale of Stock.—In action on note given for stock in corporation, defended on ground of false representations in sale of stock, representations that corporation in question had reserve on hand, and that it was organized under state banking laws, were representations of fact whose effect was to induce purchase of stock, and defendant was not bound to make independent inquiry or investigation to ascertain truth thereof.—Guaranty Mortgage Co. v. Ellison, Utah, 239 Pac. 29.

31.——Tax on Capital.—Pub. Acts Mich. 1921, No. 85, as amended by Pub. Acts 1923, No. 233, providing that a corporation, organized and doing business under state laws, is to pay 3½ mills upon each dollar of its paid-up capital and surplus, excepting therefrom property or capital without the state, or capital used in interstate commerce, held not invalid as interfering with foreign or interstate commerce (Const. U. S. art. 1, § 8), or denying equal protection of laws (Const. U. S. Amend. 14), inasmuch as such tax is a "privilege or excise tax" imposed as incident to right to be a corporation, and not a property tax on the capital or surplus of the corporation; reference thereto being made merely to determine what is a fair price to pay for such privilege.—In re Detroit & Windsor Ferry Co., Mich., 205 N. W. 102.

32. **Covenants** — Building Restrictions. — Deeds, conveying lots, in Tudell addition to Westmoreland, W. Va., contained the following stipulation: "That there shall not be erected on the said premises any building other than for dwelling or residence purposes, or purposes of like nature, and the necessary proper outbuildings pertaining thereto; nor shall any building erected thereon be used for other than dwelling or residence purposes or purposes of like nature, and as such outbuildings pertaining thereto. The covenants herein contained shall run with the land and the provisions herein shall extend to the heirs and successors and assigns of the parties hereto." The erection and operation by an incorporated railroad company of a spur track leading from the main line of such railroad, operated by said railroad company, across some of said lots, will not cosntitute a violation of said restrictive covenant.—Neekamp v. Huntington Chamber of Commerce, W. Va., 129 S. E. 314.

33.——Restrictions.—Restrictive covenant in deed that land sold would "never be rented, leased, sold, transferred, or conveyed unto any negro or colored person, under penalty of $2,000," held valid and enforceable in equity.—Torrey v. Wolfes, U. S. C. C. A., 6 Fed. (2d) 702.

34. **False Imprisonment**—Unauthorized Arrest.—Member of Pennsylvania Railroad police force, appointed under Act Feb. 27, 1865, § 3 (P. L. 225; Pa. St. 1920, §18544), whose power is general, in arresting plaintiff for embezzlement and forgery not immediately concerning property of railroad company, was not acting as agent of company but as public police officer, and, on failure of plaintiff to prove that such act was expressly authorized or subsequently ratified by company, company was not liable therefor.—Bunting v. Pennsylvania R. Co., Pa., 130 Atl. 306.

35. **Fraud**—Cause of Action.—A petition alleged that defendant, a manufacturer of chemicals and medicinal preparations, which it sold to druggists generally, so made and sold a preparation called "Camphor Solution Neutral," which it advertised and recommended for use by hypodermic injection, that such preparation, when properly made as a solution of camphor in a vegetable or animal oil, was a harmless and beneficial remedy, well known to and used by physicians and hospitals, but that defendant's preparation was made with mineral oil, which rendered it injurious to health, as defendant well knew; that plaintiff was treated with such preparation by a physician, who had no knowledge that it contained mineral oil, and as a result was caused great pain and suffering and permanent injury. Held, that the cause of action as pleaded contained many of the elements of an

action for fraud, in which the element of privity of contract was not essential, and that the petition stated a cause of action, whether considered as action for fraud, or solely an action for negligence, or a combination of both such actions.—Hruska v. Parke, Davis & Co., U. S. C. C. A., 6 Fed. (2d) 536.

36. **Fraudulent Conveyances**—Unrecorded Lease.—Where a lessor of well casings was out of possession of such casings, and made no effort to regain possession for over 2 years from time lessee took possession under contract of lease, which was never put of record, held that transaction comes within Rev. St. atr. 3969, and as to creditors and purchasers absolute property of casings is with the possession.—Mitchell v. Eagle Creek Oil Co., Tex., 275 S. W. 211.

37. **Indians**—Judicial Power of State.—Questions whether state's judicial power extends to controversy in respect to the succession of Indian lands within state boundaries, whether peacemakers' court is subject to authority of state Supreme Court, and whether subject-matter of particular controversy and proceedings are within exclusive control of national government, and beyond authority of state, must be first submitted to state courts, and power of highest court of state be first exhausted, before authority of United States Supreme Court may be invoked.—United States ex rel. Kennedy v. Tyler, U. S. S. C., 46 S. Ct. 1.

38. **Insurance**—Age.—In an action on insurance policy, evidence that insured gave age as 59, to best of his knowledge, and agent noted age on application as 60 years, does not make policy void under Rev. St. 1919, § 6161, prohibiting issuance of insurance to any person "who at nearest birthday is more than 60 years of age," since statute required one to be over 60 years and six months to be uninsurable.—Todd v. American Mut. Union, Mo., 275 S. W. 60.

39.——Damages to Ships.—Damages to ships from striking rock abutments or projections from bank of canal while being towed held not damages from "collision," within tower's liability insurance policy; "collision" as used in maritime law, referring to contact of boat involved with another boat, or, while being navigated, with a floating object.—Lehigh & Wilkes-Barre Coal Co. v. Globe & Rutgers Fire Ins. Co., U. S. C. C. A., 6 Fed. (2d) 736.

40.——Waiver of Condition.—Insurer may waive condition in policy by parol despite stipulation in policy against waiver except by express agreement indorsed on policy.—Thomas v. Employers' Liability Assur. Corporation, Pa., 130 Atl. 322.

41. **Interstate Commerce**—Oil Shipments.—Interstate shipments of oil from company's refineries by its own vessels to its storage plant, to be there stored and reshipped to substations and to customers at such times and in such quantities as business should demand, held terminated by such stoppage and storage, so that subsequent shipments from such plant to points within state were subject only to intrastate rates; the stoppage being in good faith.—Standard Oil Co. v. Atlantic Coast Line R. Co., U. S. D. C., 6 Fed. (2d) 911.

42. **Intoxicating Liquors**—Jamaica Ginger.—The mere possession of Jamaica ginger or essence of ginger, put up in accordance with the United States Pharmacopoeia, does not violate our statute, chapter 189 of the Laws of 1918, prohibiting the possession of intoxicating liquors; such as Jamaica ginger being recognized as having a medicinal value, and used as such, may be lawfully possessed. Davison v. Town of Newton, 102 So. 161, 36 A. L. R. 717, cited.—Billington v. State, Miss., 105 So. 457.

43.——Search of Automobile.—Where officers, after arrest of defendants while intoxicated, searched their persons and finding thereon a key to sedan automobile parked several blocks away, searched and discovered liquor therein and lodged complaint charging unlawful possession of intoxicating liquor, held search and seizure was lawful, under Const. art. 2, § 10, though without warrant.—People v. Garrett, Mich., 205 N. W. 95.

44.——Validity of Prohibition Act.—National Prohibition Act, tit. 2, is not invalid, because enacted before Amendment 18 of Constitution became effective, pursuant to its terms, one year after its ratification.—Druggan v. Anderson, U. S. S. C., 46 S. C. 14.

45. **Labor Unions**—Coercing Employers.—Preliminary injunction restraining trade union and employees from doing acts to compel employers to injure and annoy, and violate contracts with, telegraph company for installation of call boxes in employers' buildings solely because such company employed non-union men, held not to impose on defendants involuntary servitude, within Const. Amend. 13.—International Brotherhood of Elec. W. v. Western U. Tel. Co., U. S. C. C. A., 6 Fed. (2d) 444.

46. **Licenses**—"Dealer."—Plumber, contracting to furnish labor and material for particular undertaking, or engaging in jobbing and repairing, held not a "dealer" within purview of Act May 2, 1899 (P. L. 184), imposing mercantile tax on dealers.—Commonwealth v. Lutz, Pa., 130 Atl. 410.

47.——Sale of Stock.—Corporate Securities Act, § 2, subd. 9(a), as amended by St. 1923, p. 89, § 1, making the requirement for license as broker applicable to owner of securities not the issuer thereof, if he desires to sell his stock in more than one transaction, is in violation of Const. U. S. Amend. 14, and Const. Cal. art. 1, §§ 1, 13, as contravening right to enjoy, acquire, and protect private property.—People v. Pace, Cal., 238 Pac. 1089.

48. **Liens**—Freight Charges.—Party advancing money for freight charges and purchasing tires to be placed upon automobile does not have a lien thereon under Civ. Code, § 3051.—Nelson v. Yonge, Cal., 239 Pac. 67.

49. **Master and Servant**—Assumption of Risk.—Employee in interstate commerce, injured in descending ladder from tank which he was repairing, held to have assumed the risk resulting from any failure to furnish a sufficient number of helpers and a safe place to work, he knowing he was to have but one helper, and the character of the place, including the uneven ground and the short ladder, the cause of any unsafety.—Gulf & S. I. R. Co. v. Hales, Miss., 105 So. 458.

50.—Contingent Salary.—In action by theater manager for salary, wherein owner pleaded that, under contract, he was not to be individually liable, but that salary was to come only from proceeds of business, evidence of owner's statements as to losses in operating business prior to manager's engagement and amount of such losses was admissible as circumstance bearing on probability of truth of owner's defense.—Ross v. James, Tex., 275 S. W. 171.

51.——Medical Fees.—Under the provisions of the Workmen's Compensation Law, an employer becomes liable for medical fees for an injured employee in one of two ways: First, by contract, either expressed or implied, with the physician; second, by the physician treating the injured employee when called under the emergency caused by the employer's failure to provide medical aid. In the former case the employer is liable under his contract; in the latter the liability is imposed by law, and the charges must be approved by the State Industrial Commission as a part of the injured employee's compensation, but where the record discloses that no contract, either expressed or implied, was made for such services, the party rendering such services cannot recover upon contract, and where the record discloses that the provisions of the Workmen's Compensation Law have not been complied with, he cannot recover by virtue thereof.—Farley v. H. T. Milling Co., Okla., 239 Pac. 451.

52.——Scope of Employment.—Servant, during his meal hour, having left place at which he was employed to work, and being entirely free from orders and control of master, while attempting to raise wire so that plaintiff's horse might pass thereunder was performing a service of courtesy or assistance for plaintiff, working jointly with him, and was acting beyond scope of his general employment, and hence defendant was not liable for his negligence causing injury to plaintiff.—Appalachian Power Co. v. Robertson, Va., 129 S. E. 224.

53. **Mines and Minerals**—Lease.—A second lessee, subrogated to all rights of action and warranty which owner or lessor possesses, can assert forfeiture of a lease which incumbers property, prior in point of date and registry to that of suing lessee.—North Cent. Texas Oil Co. v. Gulf Refining Co., La., 105 So. 411.

54.——Passageways.—The owner of all the coal, limestone rock, ores, and minerals underlying land between a stratum near the top of the surface and the center of the earth may use the passageways formed in the operation thereof in transporting minerals from adjoining lands.—Robinson v. Wheeling Steel & Iron Co., W. Va., 129 S. E. 311.

55. **Monopolies**—Anti-Trust Law.—Evidence that, under contract for purchase and sale of products, buyer was to sell products so purchased only in a limited territory at retail prices listed to him, and that seller was not to sell similar products to any

other person in that territory, held to warrant finding that contract would eliminate competition, and hence was violative of anti-trust statutes.—McConnon & Co. v. Ralston, Tex., 275 S. W. 165.

56.——Anti-Trust Law.—That buyer, purchasing articles outright, was largely governed by seller's suggested retail price list in disposing of articles bought, held not in itself a violation of anti-trust statutes.—W. T. Rawleigh Co. v. Fletcher, Tex., 275 S. W. 210.

57. **Municipal Corporations**—Bond Issue.—In proceeding to validate municipal bonds issued under Municipal Utility District Act, where purpose of bonds was to obtain water supply and facilities to be used by district and to dispose of any surplus water, and intention was to take water to boundaries of district and impound it in reservoir already connecting with distribution system supplying inhabitants of part of district, fact that no system of distribution was provided by project, or as part of it, did not make bond issue invalid because project was not within public purpose of district.—In re Validation of East Bay Mun. Util. Dist. Water Bonds, Cal., 239 Pac. 38.

58.——Negligence of Employee.—City, in appointing elevator operator for criminal court building, and in operating elevator through such operator, held engaged in discharging a public duty, and in exercising governmental function.—Howard v. City of New Orleans, La., 105 So. 443.

59.——Parking Ordinance.—An ordinance which prohibited parking on public square of vehicles operated to transport passengers and freight for a remuneration, and which affected all engaged in that business, held not void as being discriminatory class legislation, notwithstanding the ordinance did not prohibit other lines of business from parking their vehicles and conducting their business on the public square.—West v. City of Waco, Tex., 275 S. W. 282.

60.——Zoning Ordinance.—The inadequacy of fire fighting facilities of village to take care of combined store and apartment house in particular district is not a justification for refusing permit for erection of such building under zoning ordinance.—Eaton v. Village of South Orange, N. J., 130 Atl. 362.

61.——Zoning Ordinance.—A provision in zoning ordinance, requiring building to be set back 25 feet from street or property line, held not a valid exercise of police power, and fact that there is "considerable traffic"—"automobile and otherwise"—at intersection of street on which property fronts does not justify the restriction.—Eaton v. Village of South Orange, N. J., 130 Atl. 362.

62. **Negligence**—Attractive Nuisance.—In action for death of children through cave-in of sand wall on defendant's excavated premises, it was error to grant defendant's motion for judgment notwithstanding verdict, on finding by jury that proximate cause of accident was excavations made by children, since under doctrine of attractive nuisances it is immaterial that affirmative act of child after reaching premises was proximate cause of injury.—Baxter v. Park, S. D., 205 N. W. 75.

63.——Resort Keeper.—Where, plaintiff was injured by collapse of defective amusement device in defendant's resort while sitting in a car being driven by concessionaire to dining hall, who had stopped near such amusement to unload packages for his stand, held defendant was not relieved of liability by his concessionaire so parking where it was customary for people generally to park there.—Harvey v. Machtig, Cal., 239 Pac. 78.

64. **Oil and Gas**—Lease.—Where oil and gas lease required well to be commenced and prosecuted with diligence, to prevent termination of lease, and where in August drilling work was suspended till November, when well was developed as gas well, but lessors, with knowledge of default, raised no objections to continued existence of lease, they waived right to have it annulled, and by estoppel lost right to deny lease was in force when paying gas well was brought in.—Transcontinental Oil Co. v. Spencer, U. S. C. C. A., 6 Fed. (2d) 866.

65. **Payment**—Duress.—A threat by a party to a contract with a charterer to abrogate the contract which would cause it great loss, unless the charterer paid an obligation of the shipowner, for which it was not liable, held to constitute legal duress.—Furness Shipping & Agency Co. v. Barber & Co., U. S. C. C. A., 6 Fed. (2d) 779.

66. **Public Utilities**—Rates.—Public utility gas company held entitled to allowance for "going value" in arriving at valuation of property for rate purposes.—State v. Busby, Mo., 274 S. W. 1067.

67. **Railroads**—"Damages Sustained in Operation."—Damages arising from violation of Vernon's Sayles' Ann. Civ. St. 1914, arts. 6601, 6602, making railroad liable for damages and penalty for allowing Johnson grass seed to spread from right of way to adjoining land, are "damages sustained in operation of railroad" within articles 6624, 6625, making company purchasing and taking over franchises of another company liable for all subsisting "damages to property sustained in operation of railroad" since maintenance of right of way is part of operation of railroad; "operation" meaning a course of action or series of acts by which some result is accomplished.—Missouri-Kansas-Texas Ry. Co. of Texas v. Wells, Tex., 275 S. W. 218.

68.——State Law.—State statute requiring erection and maintenance of water-closets by railroads held not intended to interfere with or place burden on interstate commerce, and any burden resulting thereto by its enforcement is incidental, and does not supersede police power of state without more explicit federal legislation by Congress.—Fort Worth & D. C. Ry. Co. v. State, Tex., 275 S. W. 111.

69. **Sales**—Delivery.—Under new contract, by which coal company agreed to supply contract coal to buyer from all its mines, subject only to a car shortage coal company was not relieved from its obligation by proof of car shortage at two of its mines.—Virginia Iron, Coal & Coke Co. v. Woodside Cotton Mills Co., U. S. C. C. A., 6 Fed. (2d) 442.

70. **Searches and Seizures**—Incidental to Arrest.—After arrest for conspiracy to violate Harrison Act, search without warrant of house of one of alleged conspirators, which was several blocks distant from house where arrest was made, held violative of Const. Amend. 4, and not justifiable, as incidental to lawful arrest.—Agnello v. United States, U. S. S. C., 46 S. Ct. 4.

71.——Warrant.—Belief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for search of that place without a warrant, and this notwithstanding facts unquestionably showing probable cause.—Agnello v. United States, U. S. S. C., 46 S. Ct. 4.

72. **Taxation** — Gasoline. — Laws 1925, c. 229, amending Laws 1923, c. 225, §§ 2, 5, 6, as amended by Laws 1925, c. 228, imposing a license tax on dealers, defined so as to apply only to importers, imposes an occupation tax and is unconstitutional both in denying importers the equal protection of the law, and as violating Const. art. 6, § 18, forbidding grant to any citizens of privileges or immunities which upon same terms do not legally belong to all citizens or corporations.—Standard Oil Co. v. Jones, S. D., 205 N. W. 72.

73.——"Manufacture." — "Manufacture," in Act July 22, 1913 (P. L. 903; Pa. St. 1920, §§ 20366-20368), exempting manufacturing corporations from payment of capital stock tax, means fabrication or composition of new article, of which imported material constitutes an ingredient or part.—Commonwealth v. Sunbeam Water Co., Pa., 130 Atl. 405.

74.——Unincorporated Association.—Shares in a voluntary unincorporated association, created under laws of commonwealth and established by deed of trust conveying real estate within commonwealth and creating a pure trust, held to constitute "property within the commonwealth," within G. L. c. 65, § 1, as amended by St. 1922, c. 403, § 1, and subject to excise tax thereunder.—Baker v. Commissioner of Corporations and Taxation, Mass., 148 N. E. 593.

75. **Theaters and Shows**—Negligence.—Where patron of amusement device paid fare after being assured of its safety, but without knowledge of its nature or operation, placed herself under exclusive control of agents operating it, and suffered from accident, which in ordinary course of things was such as does not happen if those who had charge of construction, maintenance, or management used reasonable care and diligence, occurrence of accident was sufficient to carry case to jury on question of whether accident arose from want of reasonable care.—Carlin v. Smith, Md., 130 Atl. 340.

76. **Vendor and Purchaser**—Representation.—Falsity of vendor's representation, on which purchaser relied, of land being free of coco grass, need not have been known by vendor to allow damages for presence of the grass to be offset in action for balance of price.—Hines v. Lockhart, Miss., 105 So. 449.

77. **Workmen's Compensation**—"Tips."—Inclusion in weekly wage of amounts received by employee as tips, not contemplated by parties in making contract of employment, held to necessitate reversal of award.—Anderson v. Horling, N. Y., 211 N. Y. S. 487.